Supreme Court, U. S.
FILED
MAR 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1036

OLETA GRAVITT, ETC., ET AL.,
Petitioners,

VERSUS

SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL.,
Respondents.

PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 24, RULES OF THE SUPREME COURT OF THE UNITED STATES

LAW OFFICES OF PAT MALONEY, INC.
Pat Maloney
Jack Pasqual
2001 Frost Bank Tower
San Antonio, Texas 78205

ATTORNEYS FOR PETITIONERS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-1036

OLETA GRAVITT, ETC., ET AL.,
Petitioners.

VERSUS

SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL.,
Respondents.

PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 24, RULES OF THE SUPREME COURT OF THE UNITED STATES

OF COUNSEL:

LAW OFFICES OF PAT MALONEY, INC.
Pat Maloney
Jack Pasqual
2001 Frost Bank Tower
San Antonio, Texas 78205

ATTORNEYS FOR PETITIONERS

PETITIONERS' REPLY BRIEF

Petitioners respectfully file their Reply to Respondent's Brief and call to the attention of the Honorable Supreme Court the following authority decided on November 15, 1976 and, therefore, not included in the original Petition for Certiorari, viz: *Volvo Corporation of America, Applicant vs; William W. Schwarzer, Judge;* United States District Court for the Northern District of California (Charlene P. Rosack, Etc., Et Al – Real Parties in Interest). No. A-395. (97 S. Ct. 285 1976).

The cited case (significantly absent from Respondent's Brief) is entirely dispositive of this matter. The case clearly demonstrates that the Opinion of the Fifth Circuit in the case at bar conflicts with *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d. 542 (1976), and the Ninth Circuit (*Volvo Corporation of America, supra*).

Justice Rehnquist, in the *Volvo* case, points out precisely why the Fifth Circuit Opinion in the instant case is erroneous, stating:

> "Applicant's position would mean that any allegedly erroneous application of Sec. 1447(c) would be reviewable by Writ of Mandamus, leaving the Sec. 1447(d) bar extant only in the case of allegedly proper applications of Sec. 1447(c); a reading too Pickwickian to be accepted and contrary to the clear language of *Thermtron.*"

The District Judge in the instant case made the determination that he was without jurisdiction. The Order of Remand now presented to this Honorable Court for review, was made pursuant to 28 U.S.C. Sec. 1447(c). Therefore, as noted by Justice Rehnquist, in *Volvo*:

> "It is unquestioned in this case and conceded by Petitioner that this Section prohibits review of all remand orders issued pursuant to Sec. 1447(c) whether erroneous or not . . . *if a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction', his Order is not subject to challenge in the Court of Appeals by appeal, by mandamus, or otherwise.*" (*Thermtron*, 423 U.S. at 343, 96 S. Ct. at 589) (Emphasis added).

It is apparent that the District Judge in *Thermtron*, while admitting jurisdiction, issued the Remand Order as a device to clear his docket. Judge Spears, on the other hand, determined that he *lacked jurisdiction*, and therefore, remanded the case to the State Court.

The effect of the ruling of the Fifth Circuit in this case means that any party aggrieved by an allegedly erroneous application of 28 U.S.C. Sec. 1447(c) may make such Order of Remand reviewable by Writ of Mandamus; clearly contrary to the intent of the Statute as interpreted by this Court in *Thermtron.*

Respectfully submitted,

LAW OFFICES OF PAT MALONEY, INC.
Pat Maloney
Jack Pasqual

By Pat Maloney Per m.a.s.
Pat Maloney
2001 Frost Bank Tower
San Antonio, Texas 78205

ATTORNEYS FOR PETITIONERS

Dated this
9th day of March, 1977

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been furnished to counsel for Respondents and to the Solicitor General of the United States.

Pat Maloney per M.A.S.

Pat Maloney

March 9, 1977